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In The

Supreme Court of the United States

October Term, 1996

WILLIAM L. TAYLOR, MARYANNE SILVA, RAYMOND W. CHRISTIANSEN, LIONEL BOURGET and DAVID A. WEBB,

Petitioners,

v.

STATE OF RHODE ISLAND, DEPARTMENT OF CORRECTIONS and GEORGE A. VOSE, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE RHODE ISLAND DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Ceriorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari although the First Circuit's opinion does not conflict with any decision of this Court, or of any other circuit.

2. Whether the $15.00 offender fee, which is applied each month to a diminishing number of probationers and parolees for services rendered during that month, with its liberal waiver provisions, is a violation of the *Ex Post Facto* Clause.

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STATEMENT OF THE CASE

In 1992, the General Assembly of Rhode Island directed that "[e]ach sentenced offender committed to the care, custody and control of the department of corrections shall reimburse the state for the cost or the reasonable portion thereof incurred by the state relating to such commitment . . . ." R.I. Gen. Laws § 42-56-38 – Assessment of Costs, P.L. 1992, c. 333, art. 97, § 2 (the "offender fee" statute). Petitioners' Appendix at 44A.[1] Among the items of cost assessed under the statute are "social services such as specialized supervision and counseling" that are provided prospectively to offenders on probation and parole. *Id.*

[1] References to Petitioners' Appendix are hereinafter designated as "Pet.App.".

The offender fee statute became effective on March 22, 1993, when its general implementing regulation was filed with the Secretary of State. A public hearing was then held on the proposed $15.00 monthly offender supervision fee on May 14, 1994. Each offender on supervised probation or parole was notified of the $15.00 per month fee by a letter dated June 16, 1994 from George A. Vose, Jr., Director of the Department of Corrections. Pet.App. 61A-62A. By regulation filed with the Secretary of State on June 17, 1994, this fee became effective on July 1, 1994. Pet.App. 45A-50A. As of that date, all probationers and parolees actively receiving specialized supervision and counseling, who did not obtain financial hardship waivers, became responsible for the $15.00 monthly fee.

In November 1994, Petitioners brought a civil action in the United States District Court for the District of Rhode Island. They alleged that the regulation imposing the $15.00 monthly fee was unconstitutional and in excess of statutory authority. Petitioners complained that the fee was unconstitutional as applied to offenders, such as they, who committed their crimes prior to July 1, 1994.

Specifically, Petitioners alleged that the regulation violated the prohibition against *ex post facto* laws found in Article I, § 10 of the United States Constitution and Article I, § 12 of the Rhode Island Constitution. They further complained the regulation deprived them of their rights to equal protection and their substantive and procedural due process rights under both the United States and Rhode Island Constitutions. Finally, Petitioners claimed that the regulation exceeded the statutory

authority granted the Department of Corrections by the General Assembly in R.I. Gen. Laws § 42-56-38.

The matter was submitted to the district court on cross motions for summary judgment, supported by an agreed statement of facts. Pet.App. 51A-58A. Petitioners' motion was granted as to *ex post facto* and that the Department of Corrections exceeded its statutory authority. Pet.App. 11A-37A.[2] Respondent George A. Vose, Jr. was dismissed on the basis of qualified immunity and Respondents were granted summary judgment on the substantive due process issue. The court did not reach the procedural due process issue. The court issued a second opinion clarifying the effective date for imposing the fees. Pet.App. 38A-39A. Judgment entered on January 16, 1996.

On December 4, 1996, the Court of Appeals for the First Circuit reversed. *Taylor v. State of Rhode Island*, 101 F.3d 780 (1st Cir. 1996). Pet.App. 1A-10A. In upholding the $15.00 monthly fee, the First Circuit reasoned that the legislature imposed a modest, civil charge which is entirely remedial and that its practical effect is neither retributive nor deterrent in nature. Pet.App. 7A-10A. The First Circuit remanded for further proceedings on Petitioners' procedural due process claims under federal and state law.

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[2] The district court's decision is reported at 908 F. Supp. 92 (D.R.I. 1995).

SUMMARY OF ARGUMENT

There is no reason for this Court to grant Petitioners' application for a writ of certiorari, as the First Circuit's decision does not conflict with any decision of this Court or with any decision of any other circuit. The touchstone of the *ex post facto* analysis is whether the challenged state action is punishment; if not, the inquiry ends. The Petition should be denied as the offender fee is not punishment and the *Ex Post Facto* Clause does not apply.

ARGUMENT

I. THE FIRST CIRCUIT'S OPINION IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER CIRCUITS.

A. This Court's Recent Decision In *Lynce v. Mathis* Is Entirely Consistent With The First Circuit's Ruling.

1. The Facts In *Lynce* Are Inapposite To The Underlying Facts In This Case.

This Court's recent decision in *Lynce v. Mathis*, 117 S.Ct. 891 (1997), involved a statutory change which retroactively canceled provisional release credits awarded to inmates. In 1986, petitioner received a 22-year prison sentence for attempted murder. He was released from prison in 1992 after earning early release credits totaling 5,668 days, including 1,860 days of "provisional credits" awarded as a result of prison overcrowding. Thereafter, the state attorney general issued an opinion canceling all provisional credits retroactively awarded to prisoners

convicted of murder or attempted murder. Petitioner was arrested and returned to prison. 117 S.Ct. at 893.

This petition involves R.I. Gen. Laws § 42-56-38, which directs sentenced offenders to reimburse the state for, *inter alia*, the cost of social services such as specialized supervision and counseling. The offender fee statute, which authorizes the Department of Corrections to assess a fee to reimburse the state for costs, bears no resemblance to the plight of the petitioner in *Lynce*, who had previously received over five (5) years of gain time, was released from prison after the statutory change, and was then rearrested and reimprisoned.

2. The Finding That The Offender Fee Is Not Punishment Is Consistent With The Holding In *Lynce*.

The "narrow issue" in *Lynce* was whether the amendments disadvantaged petitioner by increasing his punishment. *Id.* at 896. The *Ex Post Facto* Clause prohibits legislatures from enacting statutes, such as the amendment in *Lynce*, which retroactively cancelled gain time actually awarded to prisoners. In other words, while the *Ex Post Facto* Clause prohibits a statutory amendment which retroactively increases punishment for criminal acts, the clause does not apply to the civil prospective $15.00 monthly assessment. *See Martel v. Fridovich*, 14 F.3d 1, 3 (1st Cir. 1993) (the *Ex Post Facto* Clause does not apply to revised rules which are not punitive).

In *Lynce*, this Court reviewed the major Supreme Court *ex post facto* cases and clarified that the appropriate focus is whether the statutory change increased the

"quantum of punishment". 117 S.Ct. at 897.[3] The Court focused on the decision in *Morales, supra,* that *ex post facto* protections do not apply when the frequency of parole hearings were decreased for certain offenders, because there was no reason to conclude that a prisoner would spend more time in prison. *Id.* at 897.[4] As the offender fee is a civil charge, rather than punishment, the *ex post facto* protections do not apply. *Id.* at 896.

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[3] *Weaver v. Graham,* 450 U.S. 24 (1981) (statutory amendment that retroactively reduced the amount of gain time credits available to prisoners, in effect eliminating the lower end of the possible range of prison terms, violated the *Ex Post Facto* Clause); *Miller v. Florida,* 482 U.S. 423 (1987) (statutory change was an *ex post facto* law because prisoner's presumptive sentencing range increased); *Lindsey v. Washington,* 301 U.S. 397 (1937) (new statute requiring petitioners to be sentenced to a maximum term of imprisonment violated *ex post facto* proscription). Conversely, where punishment is not increased, the *Ex Post Facto* Clause is not implicated. Thus, *Collins v. Youngblood,* 497 U.S. 37 (1990), held that a new Texas statute allowing reformation of an improper jury verdict assessing unauthorized punishment to a person previously convicted was not an *ex post facto* law. In addition, *California Department of Corrections v. Morales,* 514 U.S. 499 (1995), reasoned that amending the law governing parole suitability hearings, to defer subsequent parole hearings for up to three years, did not violate the *Ex Post Facto* Clause.

[4] The First Circuit noted that the teachings of *Morales* applied to the offender fee, stating "that courts must determine whether a legislative change 'produces a sufficient risk of increasing the measure of punishment' . . . [and] [a] legislative change which creates only a 'speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment' is insufficient to raise the *ex post facto* specter." 101 F.3d at 784, n. 9, Pet.App. at 10A.

B. The First Circuit's Opinion Does Not Conflict With The Fifth Circuit's Decision In *Sheppard*.

Petitioners disingenuously claim that *Sheppard v. Louisiana Board of Parole*, 873 F.2d 761 (5th Cir. 1989), conflicts with the decision by the First Circuit.[5] In fact, the Fifth Circuit remanded *Sheppard* and the appended *Murray* without any opinion on the merits. *Id.* at 762, 764-65. Ultimately, *Sheppard* was dismissed without prejudice by the district court. *Sheppard v. Louisiana Board of Parole*, C.A. No. 88-0639 (M.D. La. 1990).[6] *Murray* concluded with a district court decision that Louisiana's parole supervision fee was not an *ex post facto* law, because it was not punishment and did not flow from the commission of a crime and was, instead, an administrative fee for the purpose of defraying the cost of parole supervision. *Murray v. Phelps*, C.A. No. 88-0129-A (M.D. La. 1993). This is the identical conclusion reached by the First Circuit; that Rhode Island's modest, cost-based supervisory fee is remedial and not punitive. *Taylor*, 101 F.3d at 783-84, Pet.App. 8A.[7]

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[5] *Sheppard* appended *Murray v. Phelps*, No. 88-3302 (5th Cir. Feb. 3, 1989) 867 F.2d 1426 (table) (unpublished). The cases are factually similar and both were remanded to the district court for further proceedings.

[6] Since the *Sheppard* and *Murray* district court decisions are unreported, Respondents submitted an Appendix in the district court of Rhode Island containing a certified copy of the docket and order in *Sheppard* and a certified copy of the docket and the court's opinion and judgment in *Murray*.

[7] Noteworthy is the fact that the First Circuit neither cited nor discussed *Sheppard* and *Murray*, although both parties cited the cases.

Moreover, in both *Sheppard* and *Murray*, parole was either revoked or subject to revocation for nonpayment of the parole fee. Such is simply not the case here. The appellate court noted, "[a]s the district court recognized, any possible link between nonpayment of the offender fee and the revocation of parole/probation is too attenuated to render the offender fee violative of the *Ex Post Facto* Clause, *Taylor*, 908 F.Supp. at 101, especially since *inability to pay* constitutes grounds for waiver." 101 F.3d at 784, n. 9.[8] Thus, given the outcome of both *Sheppard* and *Murray*, there is no basis for Petitioners to pretend a conflict exists between circuits.

C. Petitioner Misconstrues The Recent Holding In *Ursery*.

The majority in *United States v. Ursery*, 116 S.Ct. 2135 (1996), held that civil forfeitures do not constitute "punishment" for the purposes of the Double Jeopardy Clause. The *Ursery* Court analyzed a line of "punishment" cases including *United States v. Halper*, 490 U.S. 435 (1989), *Austin v. United States*, 509 U.S. 602 (1993) and *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994), to address the lower court's finding that these cases had disturbed a long line of cases holding that *in rem* civil forfeitures are not punishment.

Petitioners misconstrue the majority discussion in *Ursery*, which simply distinguishes civil forfeiture from civil fines. They erroneously conclude that this Court specifically held that *Halper's* definitional framework is

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[8] *See* discussion of *Morales*, *supra* at n. 4.

irrelevant for defining punishment. Petitioners employ statements by the *Ursery* majority such as "[i]n *Halper*, we emphasized that our decision was limited to the context of civil penalties", 116 S.Ct. at 2144 or that *Halper* emphasizes "the case-specific nature of our inquiry," 116 S.Ct. at 2143, to argue that *Halper* only applies to double jeopardy and can never be used in an *ex post facto* case.

After neglecting to mention that the *Ursery* language simply distinguishes an *in rem* case from a penalty case, Petitioners compound this error by declaring that the First Circuit improperly used the *Halper* test to determine whether the offender fee is penal or remedial. *See Ursery*, 116 S.Ct. at 2142-43. It is axiomatic that an initial inquiry be made as to whether a statutory amendment constitutes punishment *before* utilizing the objective test in *Lynce* to assess the quantum of punishment. *See Lynce*, 117 S.Ct. at 897.

Despite Petitioners' protests, the First Circuit's use of *Halper* to determine whether the statutory change constitutes punishment, *before* entering the myriad of other *ex post facto* considerations, is consistent with the practice of other circuits. *See Artway v. Attorney General of State of New Jersey*, 81 F.3d 1235 (3rd Cir. 1996); *DiCola v. Food and Drug Administration*, 77 F.3d 504 (D.C. Cir. 1996); *Bae v. Shalala*, 44 F.3d 489 (7th Cir. 1989) (noting that *Halper* applies because the threshold question under the *Ex Post Facto* and Double Jeopardy Clauses is whether the statutory change constitutes punishment).[9] Accordingly, the

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[9] The Double Jeopardy Clause serves the function of preventing "successive punishments and . . . successive

First Circuit in this case, as well as in *United States v. Stoller*, 78 F.3d 710 (1st Cir. 1996), *cert. dismissed* 117 S.Ct. 378 (1996), properly used the *Halper* touchstone to determine whether a statutory amendment is punishment. Finding no punishment, the inquiry properly ended.

II. THE FIRST CIRCUIT CORRECTLY HELD THAT THE MODEST $15.00 MONTHLY FEE, ASSESSED PROSPECTIVELY TO ONLY THOSE PROBATIONERS AND PAROLEES ACTUALLY RECEIVING SPECIALIZED SUPERVISION AND COUNSELING SERVICES, IS NOT PUNISHMENT.

A. Introduction.

To analyze Rhode Island's offender fee program, the First Circuit considered *both* "whether the legislative *intent* was punitive in nature" and "whether the challenged civil provision is 'so extreme . . . as to constitute punishment' " 101 F.3d at 783, Pet.App. 7A, *applying Halper*, 490 U.S. at 442. *Halper* affords two levels of protective inquiry: a subjective test to determine whether the *purpose* of a statute is to punish and an objective test to evaluate whether a statute's extreme *effect* is punitive. 490 U.S. at 447-49.

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prosecutions," *Ursery*, 116 S.Ct. at 2139, while the *Ex Post Facto* Clause prevents the passage of laws which retroactively increase "punishment". *Lynce*, 117 S.Ct. at 895.

B. The Appellate Court Properly Applied *Halper's* Subjective Test.

The First Circuit initially noted that, facially, "the offender fee statute, suitably located among other Rhode Island civil statutes, imposes a civil charge." 101 F.3d at 783, Pet.App. 7A.[10] Next, the court below stated that "[t]he modest fee authorized by the statute comprises no part of any sentence imposed for the crime committed by offenders." *Id.* Further, the appellate court reasoned that the fee "is expressly designed to 'reimburse' the Department for costs directly associated with providing goods and services required to supervise probationers and parolees living in the community. R.I. Gen. Laws § 42-56-38." *Id.* In addition, the court of appeals recognized that "all offender fee revenues are dedicated to such use, Regulation 1.12.01(IV)(K), and waivers are available to offenders unable to pay. Regulation 10.07.03(II)(E)." *Id.*[11] Lastly, the First Circuit found that

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[10] The lower court was mindful of *Halper's* admonition that "[f]or purposes of determining whether a law is penal in nature, 'the labels "criminal" and "civil" are not of paramount importance.' " 101 F.3d at 783 *citing Halper*, 490 U.S. at 447.

[11] Approximately 2,547 offenders, almost 20% of the total number, were granted waivers due to financial hardship, Pet.App. 55A-56A, 19, and, as discussed in n. 13, *infra*, "banked" probationers are not required to pay the fee. Regulation 10.07.03(II)(C)(3), Pet.App. 47A.

While Petitioner claims the "fee amounts to a monetary penalty on the Petitioners which ranges between $135.00 and $3405.00", Petition at 6 and the fee also "average[s] $972 each and range as high as $3405.00", Petition at 8, Department of Corrections records reveal that Petitioners Bourget, Silva and Christiansen have zero balances, Petitioner Taylor, who is off

"the same monthly fee is assessed against all offenders released into the community who are currently under Department supervision, without regard to the nature or severity of their respective offenses." *Id.*[12]

Grounded on this analysis, the appellate court pronounced: "In our judgment, so modest a cost-based supervisory fee reasonably cannot be deemed punitive in *purpose*, especially since any conceivable retributive or deterrent effect could only be inconsequential." 101 F.3d

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probation, has an outstanding balance of $60.00 and Petitioner Webb, who would potentially qualify for waiver if he would request one as he is a workers' compensation recipient, has an outstanding balance of $225.00.

[12] The appellate court refuted the district court's determination that the offender fee was "punishment" because it was part of "the law annexed to the crime," *Calder v. Bull*, 3 U.S. 386, 390 (1798), thus linking the offender fee with Petitioners' sentences of probation. *Id.* at n. 6. The court below instead found that "the supervisory services for probationers released into the community are largely rehabilitative, both in nature and purpose." *Id. citing* R.I. Gen. Laws § 42-56-4(c) ("Rehabilitative services shall include . . . intermediary sanctions (including but not limited to . . . probation [and] parole). . . . "); *United States v. Cardona*, 903 F.2d 60, 62 (1st Cir. 1990) (probation serves goals of rehabilitation and public safety), *cert. denied*, 498 U.S. 1049 (1991); *Tillinghast v. Howard*, 109 R.I. 497, 501, 287 A.2d 749, 752 (1972) ("[I]t is for the purpose of giving a convicted accused the opportunity for rehabilitation that he retains his liberty and is placed on probation.") Moreover, the court of appeals highlighted the fact that "the monthly fee is not imposed on all offenders sentenced to probation, but only those actually receiving the supervisory services whose costs are defrayed by the fee. Regulation 10.07.03(II)(C)(3)." *Id.* at n. 6.

at 783-84, Pet.App. 8A. The First Circuit correctly determined that the modest $15.00 monthly fee, assessed only to offenders actively receiving services, bears no punitive purpose whatsoever.[13]

C. The Appellate Court Properly Applied *Halper's* Objective Test.

The court of appeals next "inquire[d] whether the fee nonetheless runs afoul of the objective test announced in *Halper*: a monetary assessment 'that cannot be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment as we have come to understand

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[13] "[T]he monthly fee is not imposed on all offenders sentenced to probation, but only those actually receiving the supervisory services whose costs are defrayed by the fee. Regulation 10.07.03(II)(C)(3)." 101 F.3d at 784, n. 6, Pet.App. 8A. "Nor are offenders in 'banked' status (*i.e.*, either residing outside Rhode Island or not on supervised status) liable for the fee, *id.* § 10.07.03(II)(C)(3)." 101 F.3d at 781, Pet.App. at 3A.

The First Circuit distinguished *In re Petition of Delaware for a Writ of Mandamus*, 603 A.2d 814 (Del. 1992), in which the monetary sanctions were "blanket surcharges . . . imposed on the offenders at sentencing, rather than reimbursements for the costs of providing services to offenders." 101 F.3d at 784, n. 6, Pet.App. at 8A. "Thus, rather than a blanket fee assessed at sentencing without regard to the commencement or duration of any term of community supervision, the Rhode Island offender fee is directly and rationally related to recouping the State's costs in providing supervision to the individual offenders for whose benefit the services are rendered." *Id.* at n. 8, Pet.App. at 9A.

the term.' " 101 F.3d at 784, Pet.App. 9A, *citing Halper*, 490 U.S. at 448.[14]

"To state the question in this case is to answer it" – is the First Circuit's clear and concise application of *Halper's* objective prong. *Id.* The appellate court quotes the statute's mandatory language that " '[m]onies received under this section will accrue first to the department of corrections for use to offset costs of the specific care or service.' R.I. Gen. Laws § 42-56-38." *Id.* Further, the court below states that "implementing regulations in turn make clear that the offender fee was rationally designed to promote its legislative objective; *viz.*, reimbursement of the Department for its costs in providing the required supervisory services to its probationers and parolees. Regulation 1.12.01(IV)(K)." *Id.* Finally, the circuit notes that "implementing regulations explicitly state that the offender fees collected from probationers and parolees must be deposited in a restricted account, exclusively available for defraying Department costs in affording offenders the required community supervision." *Id.*

Accordingly, Respondents respectfully submit that the First Circuit correctly applied *Halper's* objective test by holding that "the offender fee program is entirely remedial and its practical effect is neither retributive nor deterrent in nature." *Id.* "Under the *Halper* test, therefore, the offender fee is not punitive." *Id.* Thus, the Petition presently before the Court should be denied.

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[14] The court below reasoned that "[u]nder this standard, the offender fee must be deemed 'punitive' if it 'bears no rational relation to the goal of compensating the [state] for its loss.' " *Id. citing Halper*, 490 U.S. at 449.

III. AS THE *EX POST FACTO CLAUSE* IS NOT IMPLICATED BY RHODE ISLAND'S OFFENDER FEE STATUTE, THE FIRST CIRCUIT'S DECISION HAS NO NATIONAL IMPORTANCE.

As set forth above, the $15.00 monthly offender fee, applied only to probationers and parolees actively receiving services from the Department of Corrections, is not punishment. The First Circuit correctly reasoned that the statute has no *ex post facto* implications. Such civil fees, assessed to recover the costs of goods and services, have existed for many decades and have been uniformly upheld.[15] Rather than supporting Petitioners' *ex post facto*

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[15] *See State of Rhode Island v. One Lot of $8,560*, 670 A.2d 772, 776 (R.I. 1996) ("In considering the amount that might be within the remedial limit, the Superior Court may consider . . . the cost in these cases of probationary supervision during the terms of probation imposed."); *Turner v. Nevada Board of State Prison Commissioners*, 624 F.Supp. 318, 321 (D.Nev. 1985) (upheld "the prospective application of deductions to offset the cost of maintaining an offender"); *Mellinger v. Idaho Department of Corrections*, 757 P.2d 1213, 1220 (Idaho App. 1988) ("Parole conditions are not additional punishment or penalties . . . [a]nd [r]equiring the payment of fees to defray costs of supervision is reasonable and has a rehabilitative effect."); *State of Idaho v. Walker*, 887 P.2d 53 (Idaho App. 1994) (held probation supervision fees not refundable despite reversal of conviction; reasoning that defendant had received intangible benefit from probation supervision services); *State of Arizona v. Mears*, 134 Ariz. 95, 654 P.2d 29 (Ariz.App. 1982) (to require a probationer to help defray the State's costs of supervising his probation is beneficial in the rehabilitation of the defendant, and such reimbursement into the probation fund will strengthen the criminal justice system's ability to finance its probation services); *State Treasurer v. Wilson*, 388 N.W. 2d 312 (Mich. 1986) (upheld constitutionality of statute requiring reimbursement for

claim, the fact that the vast majority of states have enacted offender fee statutes, Pet.App. at 65A-67A,[16] buttresses Respondent's central point – that legislatures nationwide recognize modest civil assessments to defray costs directly associated with offenders as both lawful and proper. Moreover, as discussed above, the courts are in agreement. Accordingly, Petitioners' bald assertion that this case has profound national importance lacks credence.

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costs of maintaining inmates in prison); *Auditor General v. Hall*, 1 N.W. 2d 516 (Mich. 1943) (prisoner's statutory obligation to pay for upkeep and maintenance if he has sufficient estate is "civil" rather than "criminal" and is not violative of double jeopardy, equal protection or due process.); *Auditor General v. Olezniczak*, 302 Mich. 336 (1942) (all able prisoners required to pay for maintenance expenses in prison, whether they were sentenced before or after the effective date of the Prison Reimbursement Act). *See also Sheppard* and *Murray*, both *supra*.

[16] This issue was *not* raised in the appellate or district court.

CONCLUSION

It is clear from the facts and law discussed above that the decision of the First Circuit is not in conflict with any decision of this Court or with any other Circuit. No intercession by this Court is necessary. Therefore, this Petition should be denied, and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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